ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re:	)	
	)	RM-8897
Request of Cellular Communications of	)	
Puerto Rico, Inc. to Hold an Auction	)	
To License Cellular RSA No. 727A,	)	
Ceiba, Puerto Rico	)	

COMMENTS OF APPLICANTS AGAINST LOTTERY ABUSE

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TABLE OF CONTENTS

Summary

Applicants Against Lottery Abuse ("AALA") hereby urges the Commission to reject the Petition for Declaratory Ruling or, in the Alternative, for Rulemaking ("Petition") filed by Cellular Communications of Puerto Rico, Inc. ("CCPR"). The Commission seeks comment on CCPR's proposal that the cellular license for Rural Service Area ("RSA") No. 727A in Ceiba, Puerto Rico be awarded through competitive bidding, and on the broader issue of the applicability of auctions to any RSA for which applications were filed prior to Congress' passage of auction legislation, in instances where the original selectee has been disqualified and no license has yet been awarded.

AALA believes that the Commission lacks the statutory authority to conduct auctions to assign cellular licenses for which applications were filed prior to July 26, 1993. According to Supreme Court precedent, the Commission can retroactively apply its auction authority only if Congress clearly stated that such application was intended. No such indication is evident in the statute or in the legislative history. In fact, Congress expressly prohibited auctions in some retroactive contexts.

Even if Congress did have this authority, however, various fairness and public interest considerations would still require lotteries for these RSA licenses. Most significantly, in successfully challenging the initial lottery results and seeking the disqualification of selectees who violated the Commission's rules, original applicants fully relied on the Commission's established policy of holding relotteries for affected licenses. In particular, the members of AALA and another applicant coalition committed over two million dollars in legal effort to this process, under the reasonable assumption that any licenses that became available would be assigned through relotteries.

Applicants' post-lottery legal efforts notwithstanding, other fairness and public interest considerations would still require lotteries for these RSA cellular licenses. The applications for these licenses were filed several years before the passage of auction legislation, and the original applicants could not have foreseen the enactment of the auction legislation or have anticipated that their licenses might someday be subject to competitive bidding. In addition, many applicants expended substantial resources prior to the initial lotteries on legal and engineering support, in full reliance on the Commission's lottery policy. That each of the original applicants "lost" in the initial lottery does not justify shifting to auctions now. Where an initial "winner" is ultimately deemed ineligible, the initial lottery is properly viewed as having never occurred at all, because a lottery was not held among eligible applicants only. In addition, not only are lotteries fairer in this context, they are also more efficient administratively, as the Commission will be able to conduct these lotteries on short order following its rejection of CCPR's petition.

If the Commission does use auctions in these RSA markets, CCPR and other entities with Interim Operating Authority -- who all disavowed interest in permanent licenses -- must be barred from bidding for such licenses. The Commission must ignore CCPR's underlying message, that the inclusion of IOA holders is crucial to the successful implementation of auctions, and adhere to the fundamental policy prohibiting such participation.

Finally, the Commission must recognize that the current rulemaking is the result of CCPR's prohibited ex parte communications with the Commission. Rather than reward CCPR for such conduct by adopting auctions here or tolerating further delay, the Commission should summarily reject CCPR's petition and impose meaningful sanctions, including the forfeiture of all future IOA revenue, on CCPR.

BEFORE THE

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To: Chief, Commercial Wireless Division
Wireless Telecommunications Bureau

COMMENTS OF APPLICANTS AGAINST LOTTERY ABUSE

Applicants Against Lottery Abuse ("AALA"), by their attorneys, hereby submit their comments on the Petition for Declaratory Ruling, or, in the Alternative, for Rulemaking (the "Petition"), filed by Cellular Communications of Puerto Rico, Inc. ("CCPR") with the Commission on September 9, 1996. As discussed below, AALA opposes CCPR's request that auctions be used to assign either the license for cellular rural service area ("RSA") No. 727A, Ceiba, Puerto Rico, or any other RSA license for which applications were received prior to July 26, 1993.

Background

In 1988 and 1989, the Commission received applications for licenses to operate cellular systems in rural service areas ("RSAs"). The Commission had earlier decided to license RSA markets through the same lottery procedure it used to license cellular MSA markets.[1/] In 1989,

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1/ First Report and Order on Rural Cellular Service, 60 RR 2d 1029, 1037 (1986).

RSA lotteries were held and tentative selectees were chosen for each RSA market. Subsequently, as a result of several years of litigation, the Commission disqualified the tentative selectee in some of these RSAs.[2/] Meanwhile, on August 10, 1993, Congress passed the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"), which, inter alia, amended the Communications Act to authorize the FCC to allocate certain radio spectrum through competitive bidding, or auctions.[3/]

On July 12, 1996, the Commission issued a Public Notice stating that on September 18, 1996, it would relottery six of the cellular Rural Service Area ("RSA") markets where the original lottery winners had been disqualified ("Lottery Notice").[4/] The approximately 25 parties comprising AALA have pending applications for authorizations in one or more of these six RSA markets. However, following unlawful and late-reported ex parte communications with the Chairman's legal advisor and unlawful ex parte meetings with legal advisors to two other Commissioners, CCPR on September 9, 1996 filed its Petition, also on an unlawful ex parte basis. The Petition requests that the Commission use competitive bidding instead of lotteries to license the Ceiba cellular RSA. In response, the Commission postponed the scheduled relotteries. Then, in an October 24, 1996 Public Notice, the Commission stated that it would treat CCPR's petition as a petition for rulemaking, and request comment on it, as well as on the applicability of awarding cellular market licenses via competitive bidding in all cellular markets

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2/ See, e.g., Algreg Cellular Engineering, 8 FCC Rcd 2226 (1993). The selectees disqualified in Algreg participated in a mutual contingent risk sharing agreement, an arrangement which violated numerous Commission rules.

3/ Pub. L. No. 103-66, Title VI, § 6002(a), 107 Stat. 312, 387 (1993), codified at 47 U.S.C. § 309(j).

4/ Public Notice, Mimeo No. 63896 (July 12, 1996).

for which applications were filed with the Commission prior to July 26, 1993, and the original winner has been disqualified.[5/]

AALA now urges the Commission to summarily dismiss CCPR's petition, and make clear that, in the future, it will use lotteries only to assign cellular licenses for which applications were filed prior to Congress' passage of auction legislation in 1993.

Discussion

I. The Commission Does Not Have the Statutory Authority to Conduct Auctions to Assign Cellular Licenses for Which Applications Were Filed Prior to July 26, 1993

The Commission should summarily dismiss CCPR's petition, as the Commission is legally obligated to conduct a lottery for any cellular license for which applications were filed prior to July 26, 1996. In order to auction such a license, the Commission would have to apply a legislative rulemaking retroactively.[6/] The Supreme Court has repeatedly found that statutory grants of rulemaking authority do not encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.[7/] The Court most recently addressed this issue in Landgraf v. USI Film Products.[8/] In Landgraf, the Court held the following:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. . . . When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect,

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5/ Public Notice, RM-8897 (October 24, 1996).

6/ Legislative rulemaking occurs when agency rules are promulgated at Congress' behest, as compared to an administrative rulemaking (agency promulgating rules on its own with no statutory mandate) or adjudicative rulemaking (rules that arise out of an adjudication).

7/ See, e.g., Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988).

8/ 114 S. Ct. 1483 (1994).

> i.e., whether it would . . . impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.[9/]

The Budget Act's provision establishing the use of auctions would clearly impose new duties and legal obligations on lottery applicants, and does not include the requisite "express command" or speak with sufficient clarity to justify retroactive use of auctions for applications already on file with the FCC. On the contrary, Congress expressly granted the FCC permission to conduct lotteries -- not auctions -- for applications on file prior to July 26, 1993.[10/]

In fact, the legislative history of the Budget Act directly addressed the issue of retroactivity, and this material clearly supports the denial of CCPR's petition. At first, Congress planned to mandate retroactivity of the auction procedures for all non-exempt (i.e., broadcast or non-profit) applications already on file.[11/] However, the Senate Amendment to this legislation (incorporated by reference into the final Conference Report) expressly stated that auctions should apply only to the granting of new spectrum licenses, and "should not . . . alter existing spectrum allocation procedures."[12/] Ultimately, Congress added § 6002(e)(2) to the final legislation -- an express permission to continue using lotteries for prior filed applications. The incorporation of this provision weighs heavily against CCPR's auction petition, in view of the fact that Congress considered, then backed off from, a mandate for retroactive use of the auctions. Furthermore, in discussing the abandonment of lotteries, the Conference Report voiced a concern over specific

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9/ 114 S. Ct. at 1505.

10/ Budget Act Special Rule § 6002(e)(2), 107 Stat. at 397.

11/ See, e.g., H.R. Rep. No. 111, 103d Cong., 1st Sess. 253, 262-63 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 580, 589-90.

12/ 139 Cong. Rec. S7986, S7995 (daily ed. June 24, 1993).

retroactive applications of the auctions by expressly allowing the FCC to maintain lotteries for all applications filed prior to July 26, 1993, mentioning "the nine Interactive Video Data Service markets for which applications have already been accepted, and several other licenses" as examples of when lotteries are to be maintained.[13/]

Thus, consistent with the interplay of this legislative history, Section 6002(a) of the 1993 Budget Act, and the above-cited Supreme Court precedent, the Commission has chosen to conduct lotteries both for IVDS licenses and cellular licenses for "unserved" areas where applications for those licenses were on file before July 26, 1993.[14/] Similarly, the Commission is required to conduct lotteries for all RSA cellular licenses for which applications were on file prior to the Budget Act's passage, including the license for the Ceiba RSA.

II. Fairness and Public Interest Considerations Require Lotteries for the RSA Licenses For Which Applications Were Filed Prior to July 26, 1993

Even if the Commission does not acknowledge its legal obligation, fairness and public interest considerations demand that the Commission conduct relotteries for all RSA licenses for which applications were filed prior to July 26, 1993. Accordingly, the Commission should speedily reject CCPR's petition.

A. In Successfully Challenging the Initial Lottery Results, Applicants Fully Relied on the Commission's Established Policy of Holding Relotteries for Affected Licenses

The fundamental unfairness of auctions stems largely from the manner in which numerous RSA licenses became available for reassignment. In most cases, the original lottery

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13/ H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 498 (1993), reprinted in 1993 U.S.C.C.A.N. 1088, 1187 (emphasis added).

14/ Implementation of Section 309(j) of the Communications Act - Competitive Bidding, 9 FCC Rcd 7387 (1994) ("Unserved Areas Order").

results were invalidated and their winners disqualified primarily as the result of legal challenges by original lottery applicants. From the outset, these applicants believed that if their efforts were successful, the Commission would hold relotteries for these licenses, limiting eligibility to original lottery participants. Such relotteries were to be held according to established Commission principle,[15] and the original applicants fully relied on this policy in spending millions of dollars to expose various violations of the Commission's lottery rules.

The experience of the more than fifty original applicants comprising AALA, Committee for a Fair Lottery ("CFR"), as well as other groups, dramatically illustrates how unfair auctions would be in this context. These applicants uncovered a wide ranging risk-sharing scheme affecting almost thirty RSA licenses, and petitioned the Commission to deny or reconsider the assignment of these licenses to the original lottery winners. In the end, all of the risk-sharers were disqualified.[16]

It is clear that without AALA's and CFR's countless hours of effort, the Commission would have been unable to make the showings necessary to bring about this result. AALA and

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15/ See, e.g., Sunde Cellular Communications, Inc., 8 FCC Rcd 502 (1993). Further illustrating the Commission's preference for relotteries in such situations, the Commission stated the following in establishing a lottery procedure for LPTV licensing in 1983:

> If the "tentative selectee" is found unqualified, all remaining applicants will participate in a lottery, unless the elimination of the application of the "tentative selectee" has broken the mutual exclusivity of the applicants.

Second Report and Order Concerning Lottery Implementation, 53 RR 2d 1401, 1416 (1983).

16/ Of the six RSA licenses for which the Commission scheduled lotteries on September 18, 1996, three were at issue in the proceeding regarding this risk-sharing agreement. These included the RSA licenses for Barnes, North Dakota; Ceiba, Puerto Rico; and Polk, Arkansas.

CFR participated heavily in pre-hearing discovery, reviewing thousands of documents and participating in the depositions of almost sixty witnesses. In fact, the Common Carrier Bureau gained most of its discovery information by sitting in on these depositions. AALA and CFR absorbed the transportation costs of the deposition witnesses, expenditures which the Bureau could not afford. For the hearing itself, AALA and CFL prepared approximately 400 case exhibits. The hearing involved forty-one days of testimony by fifty-five witnesses, and lasted almost two months.

In the end, AALA, CFR, and others committed over two million dollars in legal effort to this process, an investment without which the Commission in all likelihood would have taken no action. In doing so, these applicants acted under the reasonable assumption that any licenses which became available would be assigned through relotteries, thereby affording them the fair and legitimate opportunity denied them initially. Had the applicants thought that these licenses would be auctioned, they would not have made this effort. As a result, the affected licenses would have remained in the hands of the risk-sharers, a result detrimental both to the Commission and the public interest.

B. Applicants' Post-Lottery Legal Efforts Notwithstanding, Fairness Still Requires Lotteries for All Cellular Licenses for Which Applications Were Received Prior to July 26, 1993

Even if the original applicants had played no role in the disqualification of the RSA lottery winners, equity would still weigh heavily in favor of lotteries. First, the applications for RSA licenses were filed in 1988 and 1989, a couple of years before auctions began receiving serious legislative consideration. Thus, these applicants in no way could have foreseen the enactment of the auction legislation or have anticipated that their licenses might someday be

subject to competitive bidding.[17] In fact, this "notice" factor weighs in favor of a lottery more heavily in this context than in the unserved areas proceeding, where the parties who filed unserved area lottery applications were at least told that the Commission would "revisit" the decision to use lotteries if it received Congressional authority to conduct auctions.[18]

In addition, many applicants expended substantial resources prior to the initial lotteries in reliance on the Commission's lottery policy. Many of these parties carefully designed their business plans to account for the administrative and start-up costs associated with the lottery process, while few if any were likely to have incorporated the initial costs associated with auctions. In addition to their FCC filing fees, these applicants also expended considerable sums for pre-lottery legal and engineering support, and for loan commitment fees for their firm

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[17] The importance of proper notice is illustrated by the Commission's 1983 decision to use lotteries instead of comparative hearings to assign LPTV licenses in mutually exclusive situations even where applications had been on file prior to the Commission's adoption of its lottery rules. In support of its decision, the Commission stated the following:

> We proposed in the LPTV NPRM that if a winning applicant could not be selected on the basis of proposed comparative preferences, the cases would be referred to lottery. Thus, all post-NPRM filers were on notice that lotteries were a real possibility.

(emphasis added). Second Report and Order Concerning Lottery Implementation, 53 RR 2d 1401, 1409 (1983). The Commission's decision to switch from comparative hearings to lotteries in the cellular service was upheld by the U.S. Court of Appeals for the D.C. Circuit in Maxcell Telecom Plus, Inc. v. FCC, 62 RR 2d 1501 (D.C. Cir. 1984). The court specifically found that the applicants who complained of the Commission's decision were all on notice of the possibility of this change prior to filing their applications. Maxcell, 66 RR 2d at 1505.

[18] Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing Applications for Unserved Areas in the Cellular Service, First Report and Order and Memorandum Opinion and Order on Reconsideration, 6 FCC Rcd 6185, 6217 (1991).

financial commitment letters. If the Commission chose to auction these licenses, even if the FCC filing fees were refunded, these other reasonable expenditures would be rendered worthless.[19/]

Also, if implemented, auctions would impose new and unexpected liabilities on the original lottery applicants. An auction would require applicants to switch from the less substantial lottery showing (i.e., money to construct and operate) to a more substantial showing (i.e., money to construct, operate, and acquire the spectrum). In many cases, parties eligible under the lottery criteria might be ineligible for the competitive bidding process, an unfair and unreasonable retroactive change in policy.[20/]

Finally, were the Commission to implement auctions and reopen the application process for these RSAs, this shift would confer an unfair benefit upon any new applicants. The Commission's original public notices concerning filings for these RSA licenses put all prospective applicants on notice that if they did not file during the filing windows, they would be excluded from these assignment proceedings. Accordingly, entities who did not file during the filing windows were unable to participate in the initial RSA lotteries. Even eight years later, the original filing windows should be given full effect, precluding a second chance for such non-filers. Those parties who were timely filers and diligently complied with the Commission's

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19/ See Bowen, 488 U.S. at 220 (Scalia, J., concurring) (altering future regulation in a manner that makes worthless substantial past investment incurred in reliance upon the prior rule is an example of unreasonable retroactivity); see also National Ass'n of Indep. Television Producers and Distributors v. FCC, 502 F.2d 249, 255 (2d Cir. 1974) (new Prime Time Access Rule unreasonable because it would cause serious economic harm to independents who produced access programming in reliance on old rule).

20/ See Association of Accredited Cosmetology Schools v. Alexander, 979 F.2d 859, 865 (D.C. Cir. 1992) (citing Bowen; National Wildlife Fed'n v. March, 747 F.2d 616 (11th Cir. 1984) (undoing past eligibility as unreasonable retroactivity)).

requirements have an equitable interest in the enforcement of these rules,[21/] and the Commission cannot change its rules to the detriment of those who filed applications in conformance with the rules eight years ago.

Three years ago, in discussing a similar scenario, the U.S. Court of Appeals for the D.C Circuit shed light on the difficulties that face original applicants when the Commission reopens its application process many years into a pending proceeding:

> An observer uninitiated in the cellular licensing process might respond, "Big deal. They can just refile." It is not that easy. Neither time nor the FCC nor petitioners' competitors have stood still in the roughly four years since petitioners filed the disputed applications. In the interim, the rules of the game have changed, generally not to the petitioners' benefit. As lotteries have replaced comparative hearings, more applicants have entered the field in competition with petitioners.[22/]

Further weighing against auctions here is the Commission's own rule on cellular application processing, 47 C.F.R. § 22.959:

> Rules governing processing of applications for initial systems. - Pending applications for authority to operate the first cellular system on a channel block in an MSA or RSA market continue to be processed under the rules governing the processing of such applications that were in effect when those applications were filed, unless the Commission determines otherwise in a particular case.

C. CCPR's Arguments Regarding the Fairness of Auctions Must Be Rejected

Despite the factors described above, CCPR maintains that an auction for the Ceiba license would not be inequitable. The Commission should reject CCPR's arguments, and, given the broad applicability of CCPR's views, this rejection should be determinative for all RSA licenses.

21/ See, e.g., McElroy Electronics Corp. v. FCC, 3 CR 484, 490-91 (D.C. Cir. 1996) ("McElroy II").

22/ McElroy Electronics Corp. v. FCC, 990 F.2d 1351, 1358 (D.C. Cir. 1993) ("McElroy I").

CCPR argues that auctions would be fair in part because the original applicants already participated in and "lost" one lottery.[23/] The Commission must reject this view. Each original applicant submitted its filing fees and participated in the Commission's procedures with the expectation that its lottery would be conducted fairly, giving each applicant an equal chance to be selected as the licensee. The Commission later determined in each case that the actions of some applicants precluded a fair result, and disqualified each lottery winner. In light of the Commission's actions, CCPR's suggestion that applicants "lost" the first lottery and therefore do not deserve a relottery should not be given much credence. Because the lottery "winner" was an entity that was not eligible to participate in the lottery, the initial lotteries are more properly viewed as having never occurred at all. The original eligible applicants should now be afforded the fair and legitimate lotteries which they expected and prepared for eight years ago -- that is, a lottery where an applicant that is eligible wins.

CCPR also argues that, given the number of applications received for the Ceiba RSA license, the original lottery applicants had no reasonable expectation of success.[24/] As a result, says CCPR, it would be equitable to subject this license to competitive bidding. CCPR's argument here is irrelevant, and must be rejected by the Commission. The original RSA applicants, in the case of Ceiba and elsewhere, were undoubtedly aware of the potential downside of random selection prior to filing. This knowledge, however, did not deter them from devoting the necessary resources to what was assumed would be fair and valid lotteries. After

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23/ CCPR Petition at 5.

24/ CCPR Petition at 5.

eight years, the Commission has still not fulfilled its obligations. The Commission must do so now, and should begin by expeditiously holding the relotteries it announced on July 12.[25/]

With the passage of eight years and the possible dissolution of some of the original applicants, CCPR also claims that the winner of a new lottery would likely be unable or unprepared to begin cellular operations.[26/] This argument also carries little weight. Many of the original applicants have waited patiently since the late 1980's for the opportunity to participate in a fair and valid lottery. They have endured years of legal proceedings, as well as the deliberate pace of the Commission's administrative processes. To penalize these parties now because some fellow applicants might not have survived this period would be an extremely harsh and unfair response. Moreover, it would be an egregious miscarriage of justice to argue that the lotteries need not be held because too much time has passed, when it is the Commission that has delayed in holding the new lotteries.

D. Other Public Interest Factors Also Weigh in Favor of Relotteries

Relotteries for the RSA licenses once again available would not only be more equitable than auctions, but also more efficient administratively. For instance, prior to the filing of CCPR's petition, the Commission had already scheduled the relotteries for six RSAs for September 18, 1996. Assuming the Commission summarily rejects CCPR's petition, the Commission will now be able to conduct these lotteries on short order. In contrast, auctions would require the Commission to seek new showings from existing applicants and to refund original applicants' application fees where necessary. A move to auctions would also be costly

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25/ Public Notice, Mimeo No. 63896 (July 12, 1996).

26/ CCPR Petition at 5-6.

to the original applicants, and would significantly delay the permanent assignment of these RSA licenses.

In sum, as the Commission pointed out in its Unserved Areas Order, it was considerations of equity and administrative efficiency like those described above that led Congress to conclude that lotteries should be used to assign licenses for which applications were filed prior to July 26, 1993. These same factors convinced the Commission itself that lotteries should be used to assign licenses for unserved areas which fell into this category. CCPR's request for an auction of RSA cellular licenses arises in a similar context, and the Commission should rule that a lottery remains the appropriate means of assignment here also.

III. If The Commission Does Use Auctions to License These Unlicensed RSA Markets, Holders of IOAs Must Be Barred From Bidding for Such Licenses

The Commission should not be misled by CCPR's Petition into relying on CCPR and other holders of IOAs in the unlicensed cellular markets to deliver a windfall for the Treasury at auction. In fact, CCPR and the other IOA holders are estopped from participating in such auctions by the commitment that they made to the Commission in order to obtain those authorizations.

In its Petition, while CCPR does not explicitly state that it should be permitted to participate in any auction for the Ceiba RSA license, its underlying message is clear: To maximize the benefits of an RSA auction, the Commission must allow the IOA holder -- in this case, not so coincidentally, CCPR -- to take part. Indeed, all of the arguments that CCPR advances in favor of auctions look to the efforts and attributes of IOA permittees. Petition at 4-6. CCPR's willingness to operate in Puerto Rico 2 under an IOA demonstrates that the license for that market has "auctionable value." Id. at 5. CCPR has shown that it would build and operate

the Puerto Rico 2 market, unlike the lottery applicants, many of whom had "no operating experience" when they filed their applications eight years ago. Id. It would be able to assure continuous service to the public, while the lottery applicants might not be "in any position to commence service in the near term." Id. With such assertions, CCPR appears to suggest not only that it is most qualified to operate in Ceiba on a permanent basis, but also that it is certain to put the most money into the Treasury at auction.

The Commission cannot let CCPR's hints and insinuations obscure the fact that IOA holders are barred from participating in any assignment process for permanent operating authority. All IOA applicants must affirmatively represent to the Commission that they are not applicants for the permanent license in that market. The Commission cannot now disregard these representations as mere formalities, as this IOA holder exclusion is supported by fundamental Commission policy.

Whenever the Commission authorizes interim service, it must balance the public interest in obtaining immediate service against the potential harm to the fair consideration of competing applications. La Star Cellular Telephone v. FCC, 899 F.2d 1233, 67 RR 2d 808 (D.C. Cir. 1990). To allow one applicant to operate in a market under temporary authority poses a threat so severe to the principles set forth in Ashbacker Radio Corp. V. FCC, 326 U.S. 327 (1945), that it is allowed only where the Commission has considered all other alternatives and found them unworkable. La Star Cellular Telephone, 67 RR 2d at 809-10. So substantial is the advantage that the holder of an IOA would have over other applicants at auction -- particularly where the IOA has been in place for several years, as is the case for CCPR -- that the Ashbacker rights of the other applicants would be destroyed. Not only would the IOA holder have a unique ability to

calculate the actual value of the market through the records of its own operations there, but the market would have higher value to it than to any other bidder because of its existing business.

Thus, the principles set forth in Ashbacker and the practices that the Commission has followed with respect to issuing IOAs require that the Commission bar CCPR and other IOA holders from bidding on the markets where they hold IOAs. Moreover, since they voluntarily represented to the Commission that were not applicants for such licenses, CCPR and the other IOA holders should have no cause to complain about such exclusion. Indeed, there is something underhanded in CCPR's effort to extinguish the rights of the lottery applicants -- much as if a trustee sought to defraud the beneficiaries of the property he was supposed to safeguard.

IV. The Current Rulemaking is the Result of CCPR's Prohibited Ex Parte Communications with the Commission, and, As a Result, the Commission Must Expeditiously Reject CCPR's Petition

According to the Commission's rules on ex parte presentations, ex parte communications with Commission personnel are prohibited during the pendency of "restricted" proceedings. 47 C.F.R. § 1.1208. For the purposes of these rules, a proceeding becomes restricted upon public notice of the filing of mutually exclusive applications. 47 C.F.R. § 1.1208(c)(1). While the Commission's July 12 relottery announcement was not a response to initial applicant filings, this public notice effectively returned the affected proceedings to their restricted, pre-lottery status, and they will remain as such until they are decided by Commission order or Commission-approved settlement. In its October 24 Public Notice, the Commission explicitly recognized the restricted nature of the application proceedings for the six RSAs, and further acknowledged that CCPR's petition was an impermissible ex parte presentation to the extent that it related to the restricted proceeding for RSA No. 727A in Ceiba, Puerto Rico.

What the Commission failed to recognize, however, is that CCPR filed its petition only after it had initiated several other prohibited ex parte communications. As a former applicant and the interim licensee, CCPR was fully aware of these proceedings' restricted status. Despite this knowledge, however, CCPR had a telephone conversation with the Chairman's legal advisor on August 23, 1996 to lobby for the use of an auction to select a permanent licensee for the Ceiba RSA. CCPR followed this phone call with a face-to-face meeting on August 28, 1996.[27/] CCPR representatives also met on August 26, 1996 with a legal advisor to Commissioner Quello, and on August 28 with a legal advisor to Commissioner Chong. On the basis of these meetings, CCPR filed its Petition on September 9, 1996, and, not coincidentally, the Commission issued a Public Notice postponing the scheduled lottery the very next day.[28/]

All of these discussions clearly contravened the Commission's rules on ex parte presentations. Not only did these presentations occur during restricted proceedings, they were also "directed to the merits or outcome" of these proceedings. 47 C.F.R. § 1.1202(a). See, e.g., Russell H. Carpenter, Jr., Esq., 3 FCC Rcd 6141 (OMD 1988). A primary goal of CCPR, after all, is to convince the Commission to assign the Cieba RSA license through an auction, where CCPR would presumably be a likely winner if permitted to participate. Even if CCPR is excluded, a decision in favor of auctions would surely alter the outcome of this proceeding -- it is extremely unlikely that an auction and a lottery would assign the Ceiba license to the same entity.

[27/] Neither of these contacts was reported until September 26, 1996, a full month later.

[28/] This makes one wonder whether the cancellation of the lotteries and the initiation of the rulemaking process was arranged during the prohibited ex parte contacts.

Thus, the Commission must now face up to unlawful origins of the current rulemaking and summarily reject CCPR's petition. Moreover, in accordance with §§ 1.1216(a) and 1.80 of the Commission's rules, as well as section 503(b) of the Communications Act, the Commission should respond to CCPR's illegal conduct with meaningful sanctions. At the least, CCPR should be disqualified from further participation in the six RSA proceedings at issue. 47 C.F.R. § 1.1216(a)(1).

In addition, the Commission should subject CCPR to a substantial forfeiture. In determining the amount of a forfeiture penalty, the Commission takes into account the nature and circumstances of the violations, 47 C.F.R. § 1.80. The circumstances surrounding and the circumstances surrounding CCPR's activities here warrant harsh treatment. As holder of the IOA for the Ceiba RSA, CCPR benefits from any delay in the licensing process, as it continues to collect revenue under its IOA until another entity receives permanent authorization.[29/] Given this circumstance, it can only be concluded that CCPR made its unlawful ex parte contacts not only to bring about an auction, which it might win if eligible, but also to slow this proceeding and maximize its IOA revenue. Unfortunately, CCPR's strategy has been highly successful . The relottery for Ceiba and the other RSAs were scheduled for September 18, 1996, but, as the result of CCPR's intervention, these licenses may not be permanently assigned until well into 1997. Rather than reward CCPR's petition with further delay, however, the Commission should sanction CCPR by requiring the forfeiture of all revenue derived from its IOA since September 18, 1996.

29/ Because the system is run as part of CCPR's larger Puerto Rico system, and the equipment has been purchased and put into operation, CCPR's incremental costs of continuing the IOA are minimal. Thus, most revenues from the IOA make it to the bottom line.

Conclusion

Accordingly, Applicants Against Lottery Abuse respectfully urges the Commission to speedily reject CCPR's petition and expeditiously conduct lotteries for the RSA licenses identified in its July 12 Lottery Notice.

Respectfully submitted,

APPLICANTS AGAINST LOTTERY ABUSE

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Its Attorneys

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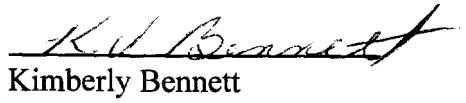
Dated: November 25, 1996

CERTIFICATE OF SERVICE

I, Kimberly Bennett, do hereby certify that I have on this 25th day of November, 1996, sent a copy of the foregoing "**COMMENTS OF APPLICANTS AGAINST LOTTERY ABUSE**" by hand delivery to the following:

Sara E. Seidman
Mintz Levin Cohn Ferris Glovsky
& Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004-2608



Kimberly Bennett